Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

WILLIAM L. SCHOLL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

ROBERT J. HIRSH
Counsel of Record
JEFFREY J. ROGERS
HIRSH, BJORGAARD & ROGERS, P.L.C.
177 North Church Avenue, Suite 700
Tucson, Arizona 85701
(520) 624-4700

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

(1) In light of *United States v. Gaudin*, is it reversible error in a 26 U.S.C. § 7206(1) tax case to remove from jury determination the necessary element of materiality by erroneously instructing the jury that "any" omission of gross income from gambling, "regardless of the amount," is a material matter without allowing the jury to consider the evidence or lack of evidence of materiality, including, but not limited to, the insignificance of the omissions, offsetting deductions of gambling losses and evidence of the proper amount of taxes paid?

(2) Can a Defendant's status as a lawyer and state court judge support a permissible inference under *Ratzlaf v. United States* and other conflicting circuit opinions, of knowledge of the federal crime of structuring of bank deposits despite explicit evidence of lack of knowledge and the government's failure to present any independent evidence of knowledge?

(3) Whether the pervasive judicial bias, prosecutorial misconduct, and evidentiary errors so contaminated the trial proceedings as to deny the Petitioner a fair trial?

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PETITION FOR A WRIT OF CERTIORARI

William L. Scholl respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinions below are unreported except for the opinion of the Ninth Circuit which is published and reported as *United States v. Scholl*, 166 F.3d 964 (9th Cir. 1999), Appendix A, and an order by the District Court which is published and reported as *United States v. Scholl*, 959 F.Supp. 1189 (D.Ariz. 1997).

JURISDICTION

The Court of Appeals entered its judgment on January 27, 1999. A timely petition for rehearing was filed on February 9, 1999, *see* Appendix B. It was denied and an amended opinion was filed on March 17, 1999. *See* Appendix A. Petitioner filed a request to enlarge time for filing his Petition for a Writ of Certiorari on June 1, 1999 because of the pending case of *Neder v. United States*, ___ U.S. ___ (1999). Justice O'Connor issued an order on June 2, 1999, extending the time for filing the Petition for Certiorari until July 15, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

26 U.S.C. Section 7206(1), *See* Appendix C

31 U.S.C. Section 5322, *See* Appendix D

31 U.S.C. Section 5324, *See* Appendix D

I. STATEMENT OF THE CASE

On December 5, 1995, a federal grand jury in Tucson, Arizona returned an indictment against William Scholl, Petitioner. *United States of America v. William Scholl*, District Court Cause No. CR-95-00576-TUC-1-ROS. The indictment

charged Petitioner with six counts of making and subscribing a false income tax return in violation of 26 U.S.C. § 7206(1) and five counts of structuring currency transactions in violation of 31 U.S.C. § 5324.

The basis of the false tax return counts was that Petitioner failed to report his gambling winnings on Counts Three through Six and part of Count Two. Count One and the other part of Count Two alleged that Petitioner failed to report income from discharge of indebtedness when he settled gambling debts in 1989 and 1990.

Counts Seven through Eleven alleged that Petitioner put his own cash in his bank account in more than one transaction.

Trial began on September 24, 1996. The Government rested on October 30, 1996. The judge granted a judgment of acquittal on Count Eight. The rest of the counts went to the jury on November 14, 1996.

The jury reached its verdict on November 19, 1996, finding Petitioner guilty of Part Two of Count Two, Counts Three, Four, Six, Seven, Nine and Ten, and finding Petitioner not guilty of Count One, Part One of Count Two (discharge of indebtedness), and Count 11 (currency transactions). Judgment and sentence was entered on February 27, 1997. The Petitioner was sentenced to five years probation with conditions.

II. STATEMENT OF FACTS

A. Background

Petitioner served as a State of Arizona Superior Court judge from 1984 until the conviction in this case, after which he resigned. His wife, Claire, worked as a sergeant with the County Sheriff's Department.

Since 1976, Petitioner took numerous vacations to Las Vegas, Nevada, usually as weekend getaways with his wife. Petitioner primarily played blackjack and craps. Petitioner never participated in any illegal gambling of any kind.

During the 1980's, he gambled on credit lines established at various casinos. In 1989, his losses mounted and he had

outstanding balances on credit lines with six different casinos. In the latter part of 1989 and the beginning of 1990, Petitioner settled his outstanding credit line balances. From that point forward, Petitioner continued to gamble in Las Vegas, but now only as a "cash" player through 1994, the last year listed in the indictment. As a "cash" player, his common practice was to purchase cashier's checks from his local checking account or personal home equity credit line, payable to the casino where he intended to stay in Las Vegas. Petitioner would then deposit the cashiers' check at the cashier's cage of that casino upon his arrival. Petitioner then drew against his cage deposit and gambled at various casinos during the trip. When his trip was over, he returned to Tucson and deposited his cash back into his checking account or personal home equity credit line account. The deposits back into his accounts generally were in increments of less than $5,000. See generally, RT 11-5-96, pp. 74-249.

B. The Casino MAC Reports On Which The Entire Case Was Based

The Government's entire case relied on casino marketing records (hereinafter "MAC logs") as the basis for all the tax and structuring counts of the indictment. To attract gamblers, casinos offer "comps," which are generally complimentary rooms, food and beverage. The amount of comps given customers is based upon a customer's theoretical losses. In order to arrive at an estimate of theoretical losses the casinos apply an "algorithm," an algebraic equation which computes a "hypothetical" loss for the gambler based on playing time, the house edge in the game and the speed of the play. The casino always assumes it will be a net winner over time. RT 9-18-96, pp. 217-221; 244-46; 266. The "MAC" logs contain estimates of gambling activity taken from player rating forms and records of all comps extended to the player.

A floor supervisor fills out the "player rating form" which later forms one part of the MAC logs. He or she supervises five to six blackjack tables watching the play of up

to 42 players. The supervisor has many other more important duties: secure the integrity of the game; make sure dealers follow procedures; handle customer conflicts and complaints; facilitate customers who need things, such as cocktails, show tickets, or meal "comps"; arrange to have the rack filled when it runs short of chips; arrange for chips to be taken away if the rack becomes too full; arrange credit for customers; observe fresh new shuffles of decks at any given table; observe any time cash is played instead of chips (dealer calls "cash plays"); observe any time cash is exchanged for chips, i.e., "changing $100"; observe any time certain denominations of chips leave a table; and, fill out the player rating forms. See generally, RT 9-17-96, pp. 109-123. Evidence at trial showed that casinos are fully aware that the "MAC" logs contain unreliable and untrustworthy estimates of a player's gambling activity and are, at best, only a guess.

Although admitted at trial over defense objections, the wholly untrustworthy nature of these casino MAC reports can be seen in the judge's rulings at the sentencing hearing. RT 2-27-97, p. 12. The judge held that they were not reliable enough for her to ascertain by a "preponderance of the evidence" that there was any actual tax loss.

The Judge reviewed the transcripts of the people who testified from the casinos:

> And without question, some of them said strenuously that the MAC records were *unreliable*, because the *motive for preparing* the MAC records were for the purpose of *determining comps*. . . .
>
> There was *no accountability for – for insuring that those records were accurate. It wasn't – those records weren't prepared for taxes. They weren't prepared for auditing*. . . .

Id., pp. 13-14. The judge noted that these records were "building speculation upon speculation." (p. 16):

> *You [the Government] have relied unequivocally on the MAC reports. I have found those MAC reports to be unreliable* for the purpose of showing that this – for this proceeding – and that is that they are more

> probable than not for establishing what his tax liability is.

Id., p. 22.

C. The Tax Counts Of The Indictment

Petitioner's defense was his belief that he could "net out" his gambling wins and losses on an annual basis. RT 11-5-96, pp. 130, 132. The evidence showed hat Petitioner believed he ended each year as a net loser (RT 11-6-96, p. 40) and therefore no gambling wins needed to be reported on form 1040.

The Government's key witness was Petitioner's certified public accountant, Ken Silva, who had been preparing his returns and working as his accountant for the last 17 years. RT 11-5-96, p. 140. Petitioner relied on Silva for tax advice and for advice on how his returns should be prepared. RT 11-5-96, pp. 140-144; RT 11-5-96, p. 205. Silva testified that he knew Petitioner was a gambler and that he had been gambling heavily over the years that he prepared Petitioner's tax returns. RT 10-8-96, p. 226. Petitioner always responded to his accountant's request for documents and information. RT 10-9-96, pp. 21, 22; RT 11-6-96, p. 61. Petitioner never seemed to express concern about paying his tax liability. RT 10-3-96, pp. 222, 233; RT 10-8-96, p. 243 (pretrial statement). Silva characterized Petitioner as an honest man and not a tax cheat. RT 10-19-96, pp. 21, 22.

Nowhere in Silva's extensive files does there exist any record, note, or letter to Petitioner, setting forth that Silva had advised Petitioner that he could not net out his losses against his wins. RT 10-8-96, pp. 244-261. Evidence reflected that Silva never gave him any more explicit information. Silva testified that in order to prepare Petitioner's returns, he would meet with Petitioner once a year for about 20-30 minutes at a Tucson restaurant. RT 10-18-96. The accountant would review last year's return and ask for any 1099 forms. He then prepared the return and mailed it to Petitioner for Petitioner and his wife to sign. RT 10-30-96, p. 308.

were: (1) Petitioner's state of mind when he signed his tax returns (i.e., was it willful); and, (2) whether the alleged misstatements were material.

The evidence in the case showed that Petitioner purchased cashier's checks before going to Las Vegas. RT 11-5-96, p. 207. It also showed that when he returned from Las Vegas, whatever was left of his money was always redeposited in the bank. RT 11-5-96, p. 208.

The redeposits form the basis of the structuring counts, discussed below. There were complete bank records of all the money brought back from Las Vegas. The testimony presented in the case showed that in the five years in question, Petitioner's cashier's checks taken for Las Vegas gambling exceeded the amount returned and deposited in the bank. He was, thus, an overall loser at gambling.

The Government never attempted to prove this case by a net worth analysis method. The Government totally relied on the casino MAC reports to prove wins/losses, the source of "structured" deposits and amounts of each. Notwithstanding the foregoing, a review of the "financial statements"[1] in question coupled with Petitioner's testimony showed that there was no increase in net worth.

D. The Structuring Counts

Petitioner testified that he was generally aware of the requirement by the bank to report currency transactions, although he was not aware of any of the details. RT 11-5-96, p. 215. Petitioner stated, however, that he was not aware that making deposits in that fashion was illegal. He testified, "But I had never, absolutely never heard of this crime of structuring. I thought that there was absolutely nothing wrong with the way a person put their own money in the bank. And, I couldn't believe that it's a crime to differentiate between putting your money in the bank in one time, or putting your own money in the bank in three times." RT 11-05-96, p. 145.

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[1] The "financial statements" were really loan applications.

There is no evidence that Petitioner ever hid money or concealed his manner or method of bank deposits. The evidence showed that all his money ended up in his account. The structuring counts that Petitioner was convicted on were from transactions in 1991, 1993, and 1994. On these occasions, Petitioner returned from Las Vegas with his own money, which was redeposited in his bank account.

E. Summary

In this case, the evidence was that Petitioner had a good faith belief that gambling winnings could be "netted out" at the end of the year. He believed at the time of filing his returns that he had lost money and evidence indicated he was, in fact, an overall loser. He believed that in all years covered by the indictment, his losses equaled or exceeded his gains and therefore a declaration of income was not required on his Form 1040, unless Petitioner received a 1099 or W2G. Moreover, the Government conceded in the indictment that Petitioner had net losses for two of the years charged, yet filed the charges anyway. Petitioner testified and his counsel attempted to argue that the misstatements on the tax returns were not only unintentional (i.e., not willfully false), but also were not material because his losses exceeded his wins. The entirety of this argument was nullified by the court's improper materiality instruction – tantamount to ordering a directed verdict on the tax counts.

Petitioner further testified that he believed it was not unlawful to deposit his own money into his bank account in more than one deposit. As to the five counts of structuring currency transactions, Petitioner was not aware that the act of structuring was illegal.

The jury could not fairly determine Petitioner's state of mind because of the overall unfairness of this trial, especially the unfair character assassination of Petitioner permitted by the trial court judge during the prosecutor's cross examination of Petitioner and his witnesses.

Petitioner was convicted of four counts of filing a false tax return and three counts of structuring currency deposits.

Petitioner appealed from those convictions. The Ninth Circuit affirmed the conviction.

III. REASONS FOR GRANTING THE PETITION

A. The Ninth Circuit's Published Opinion Is In Conflict With The Supreme Court's Decisions In *Neder*, *Gaudin* And The Circuit's Own Recent Decision In *Uchimura*. The Ninth Circuit Should Have Followed These Cases And Reversed All Tax Counts Finding That The District Court's Materiality Instruction Was Reversible Error As A Matter Of Law Because Materiality Was A Contested Issue; There Was No Evidence Of Materiality Presented By The Government; And, The Element Of Materiality Was Never Decided By The Jury.

Since *United States v. Gaudin*, 515 U.S. 506, 132 L.Ed. 2d 444, 116 S.Ct 2310 (1995), it has been decided as a constitutional matter that the issue of materiality must go to the jury. Petitioner pointed out to the District Court that *Gaudin* required that this issue be submitted to the jury. Following *Gaudin*, in *United States v. Uchimura*, 125 F.3d 1282 (1997), the Ninth Circuit further held that *Gaudin* applies to 26 U.S.C. § 7206(1) tax cases. *Id.* at 1283-4.

Nevertheless, the District Court, over Petitioner's repeated objections, relying instead on *United States v. Holland*, 880 F.2d 1091 (9th Cir. 1989), instructed the jury, in part:

> If you find the defendant made a false statement on his tax return relating to ***gross income***, ***regardless of the amount***, that is to say, if you find that the defendant received income in addition to that reported on his tax return, ***regardless of the amount***, **then** ***such omission of income is a material matter***.

RT 11-14-96, p. 142, emphasis added. The prosecutor made essentially the same argument to the jury during his opening statement, over Petitioner's objection. RT 10-01-96, pp.

75-77. Thus, not only did the court give an incorrect materiality instruction, taking the issue from the jury, the Government was allowed to take full and unfair advantage of this in argument to the jury.

Contrary to the Ninth Circuit's suggestion that Petitioner did not object to this incorrect instruction, Petitioner repeatedly objected to the Court's materiality instruction on at least nine different occasions, often at great length. *See* RT 11-04-96, pp. 6-10, 98-101; 11-12-96, pp. 7-27, 93, 95-107; 11-13-96, pp. 318-320; 11-14-96, pp. 6-10, 117-118; 11-19-96 pp. 141-2. Moreover, Petitioner offered a proper instruction based on *Gaudin*.

As to this disputed materiality, it must be remembered that the Government's evidence here was so tenuous that no tax loss could be shown by the Government. *Scholl* at 981. Moreover, the Government failed to present a scintilla of evidence or testimony that the alleged omissions on the tax returns were material to the I.R.S. in any manner as required by *Gaudin*. Had this jury been properly instructed, it might well have decided along the lines of reasoning suggested in *Uchimura*, i.e., that

> . . . just because a jury usually would agree with such a statement does not mean that a jury must agree with it as a matter of law. Even if a failure to report income is material in *most* circumstances, *it is not necessarily material in all circumstances*, since materiality of the underreporting of income *necessarily depends upon the facts of each case*. . . .

Uchimura, 125 F.3d at 1285-6, emphasis in original. The *Uchimura* Court further suggested:

> As a more cogent example, *if one's legitimate deductions exceed one's true gross income, taxable income will be zero*. Failure to report all income will thus have no effect on taxes owed, at least for that year, and unreported income may not be necessary to a determination of whether income tax is owed.

Id. at 1285, emphasis added. The Court continued in a footnote: "That no additional tax is owed of course has a bearing on materiality, but the question is ultimately one for the jury to decide." *Id.* at 1285, fn. 5.

Recently, in *Neder v. United States*, ___ U.S. ___ (1999), this Court examined whether taking the materiality issue from the jury could ever be harmless error. However, in *Neder*, the defendant failed to report over five million dollars in income. *Neder* did not contest materiality and unlike here, there was no issue of offsetting deductions. Instead, *Neder*'s only defense revolved around advice of attorney or accountant. Justice Scalia, in a footnote to his dissenting opinion, observed that the suggestion that total income is obviously information necessary to a determination of a taxpayer's income tax liability is not valid. He further stated, "If that analysis were valid, we could simply dispense with submitting the materiality issue to the jury in *all* future tax cases involving understatement of income; a finding of intentional understatement would be a finding of guilt – no matter how insignificant the understatement might be, and no matter whether it was *offset by understatement of deductions as well*." *Id.*, *Neder*, ___ U.S. at ___, emphasis added.

This case represents the exact factual scenario that troubled Justices Scalia, Souter and Ginsberg in their dissent in *Neder v. United States*, *supra*, and was alluded to in *Uchimura*, *supra*. In the present case, the jury should have been allowed to decide the contested issue of materiality instead of being instructed that "*any* omission of income, *regardless of the amount*," constitutes materiality as a matter of law. Moreover, this case raises directly the issue of whether *Holland*, *supra*, which is still used by several courts in defining materiality, is still good law in light of *Gaudin*.

The Government's case was tried, in the words of the prosecutor, under the *Holland* theory that materiality is proved by omission of even one dollar of gross income: "the law is that *any* unreported income, even, technically speaking, *the amount of $1.00*, under Ninth Circuit law, it's very clear if there's $1.00 of unreported gambling income, these tax returns are false." RT 06-20-96, p. 167, emphasis added.

Defense counsel responded by saying, "Well, Judge, I respectfully disagree with counsel. The other requirement is materiality. And I don't believe that if there is a false return that is a dollar off that that is a material perjurious statement that a jury can act upon or a judge can act upon. There must be a material falsity set forth in that return." *Id.*

One example of this factual materiality dispute can be demonstrated in count 4 of Petitioner's indictment, for which he was convicted, which reads: "That on or about the following dates during the calendar year 1992, William L. Scholl did win/(lose) at gambling in the approximate amounts, as follows:"

Date	Casino	Net Results on Trip	
02/18/92	Golden Nugget	$900	won
04/18/92	Golden Nugget	($18,700)	lost
05/04/92	Golden Nugget	$15,100	won
10/25/92	Golden Nugget	($16,400)	lost
11/12/92	Golden Nugget	($9,100)	lost
	Total	**($28,200)**	**lost**

Thus, the Government alleged that in 1992, Petitioner won $16,000, but lost $44,200, for a *net loss* of $28,200 for the year. Yet under the Government's theory and the court's mistaken materiality instruction, the jury was ordered that "any" omission of gross income was material as a matter of law. This ordered the jury to find that if Petitioner did not list the $16,000 as income on his form 1040 under "other income," even though he was permitted to deduct $16,000 on schedule A, the "omission" was a material omission as a matter of law, despite the fact that Scholl apparently paid the proper amount of taxes in each year.

Here, the Ninth Circuit opinion suggests that, despite the absence of any showing of materiality by the Government, it is axiomatic that every juror would know that a statement of zero ultimate winnings by a gambler who had both wins and losses in the year would be capable of influencing the I.R.S. *Scholl* at p. 980. The Ninth Circuit has, in essence, done what *Gaudin* and *Uchimura* both expressly forbid – i.e., ruled as a matter of law that Petitioner's statements or omissions were

material and ordered the jury to find as such – despite the factual disputes on this issue.

Because of the District Court's erroneous materiality instruction, defense counsel was prohibited from arguing materiality to the jury even though Petitioner testified that if "you don't have any income, there's nothing to report" (RT 11-05-96, p. 152) and "if you don't make any money, there wasn't anything to put on the tax return." RT 11-05-96, p. 150. Petitioner's belief that losing money gambling did not require a declaration on form 1040 and the fact that he did lose more than he won go to the very heart of materiality. As Petitioner stated, "from what I understand of a tax return, the purpose is to figure out how much money you owe in taxes and pay it, which I did every year." RT 11-07-96, p. 440.

The Court should grant certiorari to resolve the contradictions between this published case and the *Neder*, *Gaudin*, *Holland*, and *Uchimura* decisions. With legalized gambling now permitted in 48 states, this case directly raises on its facts the very issues which will now be confronted by every person who gambles to the slightest degree or buys a lottery ticket: "Is it always material, as a matter of law, that some offsetting wins and losses are not specifically reported on form 1040?" or, must this be left to a jury to decide? Finally, in light of *Gaudin*, *Holland*'s definition of materiality cannot be valid as a matter of law, especially in the gambling arena. Otherwise, a person could be prosecuted for serious tax felonies for failure to record each and every win no matter what the overall result or amount of offsetting losses. Should the gambler record the result of each roll of the dice, or each hand of blackjack, or each lottery ticket which wins five dollars . . . ?

B. The Petition For Certiorari Should Be Granted To Maintain Uniformity Between Various Circuit's Decisions And Resolve The Conflicts Between This Published Case And Existing Authority In Other Circuits Regarding What The Government Must Prove To Substantiate A Structuring Conviction Under *Ratzlaf* And Whether "Status" Alone Can Constitute Sufficient Evidence Of Knowledge That Structuring Is Illegal.

1. Introduction

Petitioner has found no published decision where a defendant was convicted of structuring his own lawfully obtained money by withdrawing it from his bank account and then openly re-depositing it back into his account. As can be seen from the indictment, Petitioner's deposits to his bank accounts did not greatly exceed the $10,000 threshold amount, and most often merely reflected a deposit of the same money he had withdrawn just prior to his Las Vegas vacation. For example, in 1993, Petitioner was found not guilty of the tax count (count 5), but was convicted of structuring money immediately after returning from a vacation that year. The evidence at trial showed that the defendant obtained cash by check and his credit card in the amount of $19,000. When Petitioner returned home he deposited $15,200 (i.e., he *lost* $3,800) back into his account in four separate deposits to cover his credit card withdrawals and the check he cashed to initiate the trip. RT 11-6-96, pp. 220-223; RT 11-5-96, p. 176.

Likewise, in 1991, Petitioner took a cashier's check in the amount of $20,000 to Las Vegas and then redeposited $22,000 during an eight day period following his return (Count 7). RT 11-6-96, p. 260.

In his brief and at trial, Petitioner argued that the Government failed to satisfy the requirement that it must prove Petitioner *knew* structuring was illegal. In *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994), the Court held that the government must prove *beyond a reasonable doubt* that the defendant had *actual knowledge* that structuring was illegal. Following *Ratzlaf*, Congress

amended the statute to eliminate the specific knowledge requirement. Because all structuring counts on which Petitioner was convicted involved deposits made *prior* to this change, *Ratzlaf* and those cases interpreting it apply.

In this case, the Government supplied *no* independent testimony or evidence to meet the *Ratzlaf* requirement of knowledge. The Ninth Circuit opinion in this case held that the jury could have inferred knowledge because of Petitioner's *status* as a lawyer and judge, the manner in which he made his deposits, and the jury's right to disbelieve his testimony. The Ninth Circuit states that while the evidence was "not overwhelming," it was apparently sufficient. *Scholl*, at p. 979.

Variations in how the circuits interpret *Ratzlaf* stem from analysis of the Court's footnote indicating that "[a] jury may . . . find the requisite knowledge on defendant's part by drawing reasonable inferences from the evidence of defendant's conduct." 114 S.Ct. at 663, fn. 19. In *United States v. Tipton*, 56 F.3d 1009, 1013 (9th Cir. 1995), the Ninth Circuit interpreted this footnote to allow consideration of circumstantial evidence in determining knowledge.

2. Allegations of Concealment Are Not Supported by the Record

The Ninth Circuit stated that whenever Petitioner made two deposits on the same day, he made deposits at different banks. *Scholl* at 979. The evidence as to these two counts of conviction showed only two deposits to different banks on two days: July 3, 1991, $700.00 to Security Pacific Bank and $4,700.00 to Citibank; and two years later, November 8, 1993, $4,500.00 to Bank of America and $3,500.00 to Norwest. Neither day was the total of the deposits anywhere near $10,000.00. This cannot compare to the Court's invocation of *United States v. Beidler*, 110 F.3d 1064 (4th Cir. 1997) ($33,000.00 at seven branches in a five hour period).

Petitioner routinely made deposits in his regular bank accounts, usually on his lunch hour, walking to the bank across the street from the court. RT 11-5-96, pp. 209-211. He

did not engage in suspicious or furtive behavior. There was no evidence that Petitioner engaged in concealing deposits.

3. Status, Education and Experience

With respect to the Ninth Circuit's opinion that, because Petitioner was a lawyer and state court judge, the jury could infer that he knew his acts were illegal (*Scholl* at 979), no case so holds. Cases which have permitted experience and education have all been significantly different than this case.

For example, in *United States v. Simon*, 85 F.3d 906 (2nd Cir. 1996), the defendant was a stock broker who was intimately familiar with cash transaction reporting requirements. In *United States v. Tipton*, 56 F.3d 1009, 1013 (9th Cir. 1995), the defendants were bank officials with cash transaction experience from which a jury could infer they knew structuring violated the law. *See also*, *United States v. Diamond*, 788 F.2d 1025, 1029 (4th Cir. 1986) (CPA's education and experience suggested an extraordinary sophistication with respect to tax matters and could support inference of knowledge.) *Cf. United States v. Pipkin*, 114 F.3d 528 (5th Cir. 1997) (despite the fact that Pipkin was a former bank president in the 1970's when CTRs were required, was later an investment company president in the 1980's and attended two years of law school, this was not sufficient to support an inference of knowledge of the illegality of structuring.)

Likewise, this is not a permissible inference that can be drawn from Petitioner's status. In his status as a state court judge, there was absolutely no conduct by Petitioner which would show any knowledge of the illegality of structuring his own money. *Ratzlaf* referred to "conduct," not status and specifically held that the presumption of knowledge of the law did not apply to structuring because, like tax laws, structuring laws are so esoteric and obscure that the Government must prove Petitioner's knowledge of structuring illegality in order to convict. *Ratzlaf* also observed that "structuring" is not, in and of itself, evil and that knowledge of the law could not be inferred from only the acts of structuring. The principal purpose of the statute was to curb money laundering "by

which criminals have successfully disguised the nature and source of funds from their illegal enterprises." *Ratzlaf*, 114 S.Ct. at 661, n. 11.

Here, evidence showed that Petitioner became a *state court* judge more than two years before federal laws were changed to make structuring a crime. He had no knowledge of structuring laws and never practiced federal criminal law prior to taking the bench. RT 11-5-96, pp. 87, 215. Two other state court judges testified at trial that they too were unaware of structuring laws. A state court judge would have no reason to know such esoteric areas of federal criminal law such as currency transactions.

4. Petitioner's Testimony

The Ninth Circuit further suggested that Petitioner testified that he did not know structuring was illegal and that the jury did not believe him, *Scholl* at 979, citing *United States v. Kenny*, 645 F.2d 1321, 1346 (9th Cir. 1981) (a defendant "risks that if disbelieved, the trier of fact may conclude that the opposite of his testimony is the truth"). The *Kenny* court, however, added that, "*Coupled with the independent evidence presented*, Oelberg's testimony forms an adequate basis for the jury's verdicts." *Id.*, emphasis added. No such *independent evidence* exists in the case at bar.

There is no reported opinion sustaining a *Ratzlaf* claim on the slight evidence in this record. *See United States v. Ismael*, 97 F.3d 50 (4th Cir. 1996) for further in-depth analysis. Additionally, Petitioner's credibility could not be fairly assessed by the jury due, in part, to the reasons set forth below. There is absolutely no evidence that Petitioner knew that the type of structuring he did was illegal. This is a case where the Government was allowed to ensnare and convict an individual who believed he was involved in innocent conduct.

C. This Court Should Use Its Supervisory Power To Review The Proceeding Below Because The Trial In This Case So Far Departed From The Accepted And Usual Course Of Judicial Proceedings As To Justify The Granting Of A Petition For Certiorari. Petitioner's Credibility Was Unfairly Destroyed Through Improper Cross-Examination Of Petitioner And His Witnesses By An Overzealous Prosecutor And Permitted By A Biased Trial Judge.

1. The Trial Fell Below Basic Standards Of Fairness In Federal Court

Petitioner's trial was undermined by far-reaching prosecutorial misconduct which was tolerated by the trial court judge. Government prosecutors engaged in unfair cross-examination of Petitioner and Petitioner's witnesses. Prosecutors in their cross-examination of witnesses and in arguments to the jury, asked questions or made statements creating unfair inferences in violation of established law. *United States v. Bush*, 58 F.3d 482 (9th Cir. 1995); *United States v. Brooke*, 4 F.3d 1480 (9th Cir. 1993). In essence, the prosecutors made this a case which revolved mostly around the fact that Petitioner was a judge who gambled. At every turn, the prosecutors were allowed, even encouraged by the trial court judge, to exploit the inherent prejudice of a judge who engaged in such unpalatable behavior.

This misconduct included the following inappropriate behavior by the Government: (1) untrue suggestions in cross-examination of Petitioner that his acquittal in this case would resolve pending actions before the Commission on Judicial Conduct and allow him to return to the bench; (2) unfairly suggesting judicial corruption by asserting Petitioner borrowed money from attorneys appearing before him; (3) repeated questioning of Petitioner suggesting his responsibility to disclose his compulsive gambling to litigants in his court, to taxpayers, and persons of authority in the judiciary; (4) questions to witnesses falsely suggesting Petitioner was transferred from superior court to juvenile court due to

implied misconduct; (5) questions falsely suggesting Petitioner abused attendance and vacation policies at the juvenile court; (6) falsely suggesting to a character witness that Petitioner improperly obtained funds from the conservatorship of his disabled son; (7) falsely suggesting in cross-examination of Petitioner that he violated Canons I and II of the Canons of Judicial Ethics; (8) falsely suggesting to the jury that Petitioner lived an opulent lifestyle; (9) falsely suggesting that Petitioner contrived a "defense of compulsive gambling," notwithstanding the court's exclusion of expert testimony on this issue; (10) prosecutor's statement to the jury in opening and closing arguments that Petitioner could never prove compulsive gambling affected his ability to fill out Form 1040, knowing Petitioner was prohibited from presenting such evidence to the jury.

The District Court judge demonstrated pervasive bias in favor of the Government and against Petitioner throughout the entirety of the trial. This necessitated three detailed motions to recuse the judge, all of which were denied. The District Court, on numerous occasions, issued *post hoc* orders well after the conclusion of contested hearings. In many instances, these orders did not conform to the record. Some of the findings in these orders were included in the Panel's opinion. The demonstrated bias was far too extensive to be fully briefed in this Petition. Only a few examples follow.

2. The Canons Of Judicial Ethics

The prosecutor was permitted to lodge a vicious smear attack on Petitioner because he was a State Superior Court Judge. In this tax and structuring case, Petitioner was asked over objection on cross-examination:

> Q. BY MR. FINK: Now, Judge Scholl, there is a – a code of conduct or a code of ethics that has been adopted by the Supreme Court of the State of Arizona that applies and has applied to superior court judges such as yourself, is there not?

* * *

Q. And – and the code of conduct consists of ethical principles which all judges, including yourself, were to comply with in connection with your service as a judge, correct?

* * *

Q. But isn't it fair to say that these, the judicial code of conduct contains these ethical principles and they set forth general principles or guidelines by which you are to operate as a judge?

RT 11-13-96, at pp. 73-76, ER34.

Q. BY MR. FINK: Were you aware during the time frame of this case, covered by this case, 1989 through 1994, that the first canon or the first ethical principle of the Judicial Code of Conduct was that a judge should participate and maintain high standards of conduct and shall personally observe those standards of conduct?

* * *

Q. And isn't that common sense, then, as well, that as a judge you have an ethical duty to maintain high standards of conduct and personally observe those standards of conduct?

Id. at pp. 78-79.

Q. And were you aware that there's an additional canon or ethical principle that a judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary?

* * *

Q. And, sir, isn't it also correct that that would include how you conduct yourself on the bench and off the bench?

* * *

Q. You would agree, would you not, that when you became a judge, you agreed to accept a level of scrutiny with respect to your private life, your personal life?

Id. at pp. 80-82.

Q. BY MR. FINK: Do you believe, Judge Scholl, that signing gambling markers and losing $170,000 in gambling in casinos, which was more than you could afford to lose, was consistent with your ethical obligations as a judge to observe high standards of conduct and to act at all times in a manner that promoted public confidence in the judiciary?

* * *

Q. Do you believe that serving as a judge, while asserting as a defense to those debts that you had an addiction and an alcohol intoxication, asserting that as a defense to those debts was consistent with your ethical obligations to maintain high standards of personal conduct and at all times to act in a manner that promoted public confidence in the judiciary?

Id. at 83-4. The examples set forth above are merely the tip of the iceberg of this line of questioning.

3. Cross Exam On Use Of Vacation Time And Violation Of Attendance Policies

One of Petitioner's character witnesses, retired appellate court Judge Lacagnina was asked on cross:

> Had you heard, Judge, that a Judge Nanette Warner, who is the presiding judge of the juvenile court to which Judge Scholl was assigned, *was of the opinion* that Judge Scholl had abused the attendance policies of the court, *leaving the court routinely at 3:00 to 4:00 p.m. daily, and that he had taken more*

> *than his allotted 23 days of vacation time*; specifically as of June of one year had taken 29 days vacation time when he'd only been allotted 23?

Id., at pp. 196-7. Petitioner denies the substance of the question.

Previously, the prosecutor insinuated in a question to one witness that Petitioner had been demoted to the juvenile court as a disciplinary measure. The prosecutor well knew that the witness would answer otherwise, yet persisted in asking the question creating the adverse inference.

Petitioner was asked numerous questions about the propriety of his actions while serving as a judge with the prosecutor insinuating improprieties in the filing of his financial disclosure statements, loans, and court-approved reimbursements from his disabled son's court controlled conservatorship account.

4. Cross-Examination On Compulsive Gambling Disorder

Petitioner was cross examined about his failure to tell juvenile and adult defendants and the "taxpayers" of the State about his compulsive gambling addiction while sitting as a judge:

> Q. And how about, did you have people who appeared before you in cases while you were a judge, defendants who were using addictions and diseases as defenses?

Id., at p. 177.

> Q. BY MR. FINK: Did you have cases in which you presided where defendants appeared before you who were asserting that they had an addiction or disease?
>
> * * *
>
> Q. BY MR. FINK: You were presiding criminal [chief judge] – you were presiding over criminal cases for some period of time, isn't that correct?

* * *

Q. And at the time when you served over criminal cases in the juvenile court, isn't it true you had defendants who came before you who were – who believed or claimed that they had addictions and diseases?

Id., at pp. 177-79.

Q. BY MR. FINK: Isn't it true that you presided over juvenile cases where juveniles would come before you with addiction problems?

* * *

Q. BY MR. FINK: And when you had cases involving juveniles who were asserting an addiction problem, *did you make disclosure to any of the parties before you that you believed that you also had an addiction problem*?

Id., at pp. 179-80, emphasis added.

Q. Any kind of statement [that he had a gambling addiction] that would come to the awareness of taxpayers of the State of Arizona?

* * *

Q. BY MR. FINK: Any time – sir, the taxpayers of the State of Arizona in Pima County are your employers, aren't they not?

* * *

Q. When is the first time that you would have made a disclosure of the fact that you believed you were a compulsive gambler –

* * *

Q. BY MR. FINK: – that would have come to the attention of the public in the State of Arizona?

* * *

Q. BY MR. FINK: Judge Scholl, when is the first time that you made a public statement that would come to the attention of the taxpayers

that you believed that you were a compulsive gambler?

Id., at pp. 181-84.

5. Improper Cross Examination Prohibited By *Doyle v. Ohio*

As a consequence of a question asked by a juror in a note to the District Court judge, (*See*, RT 11-13-96, pp. 156-157) on re-direct exam, Petitioner was asked a single question by defense counsel regarding a civil audit. Defense counsel was extremely cautious in how the question was asked, and even backed up and re-stated the question to make it absolutely clear how narrow this question was:

Q. Did you ever receive a request from Mr. Meyers [IRS agent] or Mr. Fink [the prosecutor] – well, *let me ask you this: did anybody come to audit you for the year where you could sit down with them and say, 'here are my papers,' and go over this*?

A. Nobody gave – . . .

*****

Q. Did you ever have an opportunity to provide documents to anybody *in that context* . . . **[i.e., a civil audit]**

A. I was never given the opportunity to present documents or cooperate as I had requested.

RT 11-13-96, pp. 120-121, emphasis added. In fact, Petitioner was never audited.

The Ninth Circuit held that this "opened the door" for over 20 improper questions, all of which Petitioner contends violate *Doyle v. Ohio*, 426 U.S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976) and its progeny.[2]

These questions attacked Petitioner's silence before and after the indictment, attacked his retention of counsel,

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[2] Defense counsel invites the Court to read all of the improper questions by the Government on re-cross, once the record becomes available to the court. *See, e.g.*, RT 11-13-96, pp. 195-214.

inquired into advice given by counsel, and implied he had a burden to prove his innocence and present evidence of innocence to the prosecutor *before* trial.

A *few* examples of these questions follow:

Q. And so there is a, approximately a seven- or eight-month interim between the time when you learned of the indictment – that you were under investigation and when the indictment was returned –

A. Correct.

Q. – correct? And during that interim time period, sir, wouldn't you agree with me that there was nothing to – to preclude you, to stop you from, you know, preparing a document, a letter or a memorandum, setting forth whatever information it was that you would want to provide to the government to try and head off an indictment?

* * *

Q. BY MR. FINK: And so, sir, when you became aware of the investigation in the middle of 1995, you were aware that it could involve structuring, gambling and taxes, and you never, *in the interim from when you learned about the indictment till the time the indictment was returned, you never prepared any kind of letter or memorandum or document setting forth, you know, any position that you might have had that you would want us to consider in the investigation. You never did that, did you*?

* * *

Q. And Mr. Weiss [Petitioner's attorney at the time] advised you, gave you some advice about – not to do so [not to prepare any informative document for the Government], is that right?

* * *

Q. What you're telling us now is that when you learned of the investigation you were in no

position – you were being given advice [i.e. by an attorney] not to do so or you were in no position to do so.

* * *

Q. And, sir, would you agree with me that there was – there was *nothing to preclude you or to prevent you from just sitting down, writing out your version* of what happened, or any position or any information that you wanted *to submit to the Government at that time*, that there was nothing to stop you from doing that.

* * *

Q. BY MR. FINK: *And their [i.e. your attorney] advice was – was not to present documents and not to cooperate.*

* * *

Q. By Mr. Fink: No. Sir, was it based upon the advice of your attorneys that you did not do what I've suggested, that is, the preparation of a document setting forth your position about what had happened?

RT 11-13-96, at pp. 195-202, emphasis added.

Q. And *after the indictment was – was returned*, would you agree with me that there was nothing that would prevent or preclude you from presenting any evidence, any documentation, any version of your – your side of the story at all to the Government?

* * *

Q. And would you agree with me, however, that regardless of – of what you were willing to agree or what we were willing to agree to as part of a meeting, my question to you was: There was nothing at any time to preclude you from presenting whatever information, whatever cooperation you wanted, by presenting this information in writing?

* * *

Id., at pp. 203-208. Defense counsel objected to this entire line of questioning on *Doyle v. Ohio* and other grounds, but was repeatedly overruled.

Following the impermissible questioning (20 pages of transcript), Judge Silver then exacerbated the prejudice by stating the inference forbidden by *Doyle* and instructed the jury:

> You should – I want to remind you, you must understand, as I have told you before, the defendant has no burden to prove his innocence. That's an important principle. But ***you should also understand that nothing in the law***, despite that principle, and that principle pertains throughout this trial, that ***nothing precludes him, if he chooses to do so, from providing documents or information to anyone, the Government or anyone else***.

(emphasis added), RT 11-13-96, at p. 212, ER34. The District Court judge should not have allowed the prosecutor to bludgeon the defendant repeatedly about his silence and reliance on counsel because there was no evidence the Defendant's testimony was inconsistent with his pre-trial behavior. *See*, *United States v. Ochoa-Sanchez*, 676 F.2d 1283, 1286 (9th Cir.), *cert. denied*, 459 U.S. 911, 103 S.Ct. 219, 74 L.Ed.2d 174 (1982).

6. Other Improper Cross Examination

Other improper cross examination allowed by the District Court included questions about Petitioner's membership in a country club, ownership of a rental property, ownership of a one week time share, and purchase of a ring. All of these questions had no relevance to the charges[3] and tended to unfairly and falsely portray Petitioner as living an opulent lifestyle.

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[3] The Government's case was never based on any net worth analysis. The entirety of the charges was based on the casino reports, *supra*.

7. The Trial Judge's Behavior

It is virtually impossible to cite every reference, chapter and verse where favoritism was shown to the Government or extraordinary bias or outright hostility was demonstrated by the court against Petitioner or his attorney in this case. One of the more unusual events occurred during defense counsel's closing argument.

As Mr. Hirsh was conducting closing argument, Judge Silver mouthed the word "object" or "stand up" to the prosecution. None of this came to the attention of counsel until after the case had gone to the jury. Counsel then brought this to the attention of the court by submitting an affidavit by a member of the audience who witnessed this behavior by the judge. A hearing was held. *See, e.g.*, RT 11-19-96, pp. 1-18, ER36. Mr. Hirsh pointed out to the court that witnesses told defense counsel that they saw Judge Silver mouth the word "object" towards Mr. Fink during Mr. Hirsh's closing argument, and that the judge then put her hand over her mouth as if embarrassed to have done it and thereafter sustained an objection when Mr. Fink did in fact object. *Id.*, pp. 3-4. The judge admitted the conduct and attempted to explain:

> *There was one point, and I can't determine if this is precisely the point*, where I believe there was a statement made by you that could have – *could have been* a violation of ***my*** original motion in limine on the question of whether or not you could argue that the prosecution was prosecuting the defendant because he was a judge. *And Mr. Fink looked at me with compelling, almost imploring, an imploring look, and my view was I was not going to interject. And my response was not that there was an objection. My response was, and* **I mouthed the response**, and I don't know if you remember it, I said: get up and that I would decide whether or not an objection was appropriate.

Id., p. 6, emphasis added.

Defense counsel asked "Would that have been on the record, Judge, that remark you made?" The Court responded

"Oh no." (*Id.*, p. 6) "I mouthed it." *Id.*, p 7. The judge then explained further:

> But importantly, when I did so, because of my concern of the jury . . . *I turned away from the jury* which most likely is the reason why that young woman over there . . . anyway, there was a woman with dark hair. She may – she may have seen my mouth move. I made absolutely sure that the jurors did not focus on me.

Id.

It should be noted that, during the arguments as to what the nature of this conduc by the judge was, the judge clearly did not remember *when* the incident occurred. Moreover, the prosecutors advised that they did not notice that it occurred at all. On several months' reflection, the judge, however, was able to finally pin down the *exact moment* at which this misconduct occurred in her written order in which she vilified defense counsel for over four pages. In addition, the prosecutors, who denied they saw the event occur at all, are now absolutely certain as to *when* this event appears to have occurred.

In fact, defense counsel inquired of the court whether or not there had been other improper communications between Mr. Fink and the trial judge during the trial. RT 11-19-96, p. 11. Ms. Lopez, an attorney assisting the defense, was present for closing argument and several other days of trial. She advised the court as follows:

> Judge, I really think the best way to describe it is most of *what I've observed has been eye contact, nonverbal communication, much like the event that happened Thursday at the closing argument.*
>
> It's just a visual contact that you make, and it's along the lines of what you were describing: *You saw a look on Mr. Fink's face of one imploring you.* But I think there have been occasions throughout the proceeding where I have observed that kind of behavior. And it's – *it's a most curious thing to me but I think it happens unwittingly.* I think you are not aware that it does occur, much like most of us as human beings would engage in eye contact or non-verbal communication with people, sometimes

> we're not aware of it. *But it has occurred and I've observed it periodically.*

Id., pp. 12-13, emphasis added. The court went on to try to explain stating: "So the eye contact with Mr. Fink has been, if anything, it's been minimal. It certainly hasn't been adverse. *I haven't been casting spells on him or, you know, transcend – transcendingshal – .*" *Id*, p. 13, emphasis added.

This conversation on the judge's nonverbal communication with Mr. Fink continued:

> *The Court*: Anyway, he [Mr. Fink] does have expressions, and I have noticed those expressions, the same with Mr. Miskell and I – *I felt he was saying to me, he was imploring me, you know, jump in, you know, jump in.*
>
> *Mr. Hirsh*: Mr. Fink was imploring you by nonverbal communication to jump in?
>
> *The Court*: Sort of like: Is anything going to happen here? *And frankly, I was wrong.* He's not that way. He wasn't asking me to do anything. But I took it that way, so it's my fault, and I basically – I didn't say "object," because *frankly at the time I didn't remember what the objection would have been. I said: Stand up. That's what I meant, stand up, and if you could read the words, stand up, from my mouth.*

Id., p. 1415, emphasis added. The court later admitted possibly she said "Get up." The court denied that it had made any kind of comments of the nature of "object." Later, the court began to dispute about what the volume of what she said during this incident. Her conversation was as follows:

> *The Court*: Well, if it was inaudible, how was your attention drawn to it?
>
> *Ms. Lopez*: Because of the uniqueness of the low level of volume.
>
> *The Court*: There was no volume at all.
>
> *Ms. Lopez*: I believe there was, Your Honor, I beg to differ with you. But I believe that's what in fact caused me to look up so precise and so immediate.

Id., pp. 18-19.

While the Ninth Circuit stated that Judge Silver understandably intended to non-verbally communicate with the

prosecutor to avoid interrupting defense counsel, the record is replete with instances where the judge interrupted defense counsel without any objection by the Government.

Clearly, this judge behaved as if she had a vested interest in the outcome of the trial from the very beginning. She refused to recuse herself when it was apparent that her employment with the U.S. Attorney's Office was concurrent with the investigation in this case. She refused to allow another judge to evaluate her potential bias and prejudice. Throughout the trial and all pretrial proceedings, she consistently sided with the prosecution and against the defense. She constantly threatened the Defendant and his counsel with contempt and sanctions. She precluded defense evidence, sustained most of the prosecutor's objections, and overruled most of the Defendant's. Defense counsel would always suffer the consequences whenever he accused Mr. Fink of misconduct. RT 11-7-96, pp. 30-39. (Where, again, defense counsel vilified and prosecutors congratulated for professionalism.) Finally, she allowed the prosecutor to engage in this continual and egregious misconduct and turned this trial into a theater of character assassination.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT J. HIRSH
Counsel of Record
JEFFREY J. ROGERS
HIRSH, BJORGAARD &
ROGERS, P.L.C.
177 North Church Avenue,
Suite 700
Tucson, Arizona 85701
(520) 624-4700
Counsel for Petitioner

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